

NOV 21 2005**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****BYRON CHAPIN MYERS,****Plaintiff - Appellant,****v.****GENE A. WARD; et al.,****Defendants - Appellees.****No. 04-56235****D.C. No. CV-99-07227-CJC****MEMORANDUM^{*}**

**Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding**

Submitted November 8, 2005^{}**

Before: WALLACE, LEAVY, and BERZON, Circuit Judges.

California state prisoner Byron Chapin Myers appeals pro se from the district court's order dismissing his action against defendant Spann for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a). We have

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 1291. We review the district court's determination that a prisoner failed to exhaust available administrative remedies de novo and review its findings of fact for clear error. *Ngo v. Woodford*, 403 F.3d 620, 622 (9th Cir. 2005). We reverse and remand.

The district court decided this case before our decision in *Ngo v. Woodford*, *id.* In *Ngo*, the court concluded that the prisoner had exhausted "available" administrative remedies where the prison rejected the prisoner's grievance as untimely and the prisoner challenged the untimeliness finding. *Id.* at 625. Similarly, in this case, the prison returned Myers's grievance as untimely, and Myers challenged that decision. We therefore conclude that Myers did not fail to exhaust available administrative remedies by filing a grievance deemed by the prison to be untimely.

In addition, the prison's dismissal of Myers's grievance as untimely does not result in procedural default of his current civil lawsuit. *See id.* at 631 ("We also hold that the PLRA's exhaustion requirement does not bar subsequent judicial consideration of an exhausted administrative appeal that was denied on state procedural grounds.").

Accordingly, we reverse the district court's order dismissing the action as to defendant Spann and remand for further proceedings.

REVERSED and REMANDED.